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Nos. 75-1230 and 75-1259

In the Supreme Court of the United States

OCTOBER TERM, 1975

CITIES SERVICE COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

MARATHON OIL COMPANY, PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

STANLEY D. ROSE,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals in No. 75-1230 (Pet. App. 1a-23a)[1] is

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[1] Unless otherwise specifically designated, all citations to "Pet. App." refer to the Appendix in No. 75-1230.

reported at 529 F. 2d 1016. The findings of fact and conclusions of law of the district court (Pet. App. 24a-37a) are not reported.

Neither the *per curiam* opinion of the Temporary Emergency Court of Appeals in No. 75-1259 (Pet. No. 75-1259 App. 1a) nor the opinion of the district court (Pet. No. 75-1259 App. 3a-5a) is reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals in No. 75-1230 was entered on December 31, 1975, and a petition for rehearing with suggestion for rehearing *en banc* was denied on January 28, 1976. The petition for a writ of certiorari was filed on February 27, 1976.

The judgment of the Temporary Emergency Court of Appeals in No. 75-1259 was entered on February 17, 1976. The petition for a writ of certiorari was filed on March 5, 1976.

The jurisdiction of this Court is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, 15 U.S.C. (Supp. IV) 754(a)(1), which incorporates by reference Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, and 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Emergency Petroleum Allocation Act of 1973 authorized the Federal Energy Administration to adopt a program equalizing the crude oil costs of domestic refiners.

2. Whether the purchase from another private refiner of entitlements to refine price-controlled oil under the cost equalization program constitutes a taking of private property for a public purpose, without just compensation, in violation of the Fifth Amendment.

3. Whether the purchase of such entitlements constitutes payment of a tax imposed by an administrative agency, in violation of Article I, Section 8, Clause 1 of the Constitution.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth at Pet. App. 39a-51a.

STATEMENT

In response to the nationwide petroleum shortages caused in part by inadequate domestic production and the Arab oil embargo, in the fall of 1973 Congress enacted the Emergency Petroleum Allocation Act of 1973 (the "Allocation Act"), 87 Stat. 627, 15 U.S.C. (Supp. IV) 751 *et seq.* The short-

ages were found to have created or be likely to create "severe economic dislocations and hardships," and Congress directed that the authority granted under the Allocation Act "shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on * * * the domestic economy" (Section 2, 15 U.S.C. (Supp. IV) 751).

Section 4(a) of the Allocation Act, 15 U.S.C. (Supp. IV) 753(a), requires the President to promulgate regulations "providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in * * * and at prices specified in * * * such regulation[s]." Section 4(b)(1) of the Act, 15 U.S.C. (Supp. IV) 753(b)(1), requires that these regulations must provide for the following statutory objectives, to the maximum extent practicable:

> (D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
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> * * * * *
>
> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;
>
> * * * * *
>
> (H) economic efficiency; and
>
> (I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

To minimize the inflationary impact of rising world oil prices and to provide the necessary incentive for increased domestic production of petroleum, the so-called "two-tier" pricing system for crude oil was established (Pet. App. 4a-5a).[2] Under this system, "old" oil, that is, oil from properties producing at, or less than, their 1972 levels, cannot be sold at prices in excess of a ceiling level of approximately $5.25 per barrel, which is substantially below the open market price. "New" crude oil, which is the amount of domestic crude oil extracted from a property in excess of its 1972 base production control level, until

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[2] The two-tier pricing system originally was established by the Cost of Living Council as a part of Phase IV of the Economic Stabilization Program. 6 C.F.R. Part 150, Subpart L, 38 Fed. Reg. 22536. Pursuant to Section 5(b) of the Emergency Petroleum Allocation Act, 15 U.S.C. (Supp. IV) 754(b), the President established the Federal Energy Office ("F.E.O.") and delegated to it all his authority under that Act. Executive Order No. 11748, 38 Fed. Reg. 33575. The F.E.O. adopted the two-tier system without substantial change. 10 C.F.R. Part 212, Subpart D, 39 Fed. Reg. 1924. F.E.O. became the Federal Energy Administration ("F.E.A.") pursuant to the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 97, 15 U.S.C. (Supp. IV) 761 *et seq.*

recently was permitted to be sold in the open market,[3] where it was subject to foreign competition but still commanded a substantial premium over the price of old oil (Pet. App. 26a-27a).[4] The validity of the two-tier pricing system was upheld in *Consumers Union of the United States, Inc.* v. *Sawhill*, 525 F. 2d 1068 (T.E.C.A.) (*en banc*), vacating 512 F. 2d 1112.

2. Pursuant to its statutory mandate, the Federal Energy Administration ("F.E.A.") promulgated a Mandatory Petroleum Allocation and Price Regulation (the "December 1 Rule"), 10 C.F.R. 211.63(a). It required the maintenance, for the duration of the

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[3] Until its recent modification, the upper tier of this pricing system consisted of three categories of domestic production, "new", "released", and "stripper" oil.

The price at which crude oil may be imported into this country is not regulated by the Allocation Act (Pet. App. 27a).

[4] Title IV of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 941, Sections 401 *et seq.*, amended various provisions of the Allocation Act but, with the exception noted at pp. 18-19, *infra*, is not pertinent to this litigation.

Section 401 of that Act, 89 Stat. 941, amended Section 4(a) of the Allocation Act to require that F.E.A. establish ceiling prices applicable to any first sale of domestic crude oil to produce an initial weighted average first sale price not to exceed $7.66 per barrel. Under this formula, the initial average ceiling price for lower tier oil was estimated to be $5.25 per barrel and approximately $11.28 per barrel for upper tier oil. S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 190 (1975); 41 Fed. Reg. 5111.

Section 461 of that Act, 89 Stat. 955, extended the mandatory aspects of F.E.A.'s authority under the Allocation Act for forty months, with standby authority to continue until September 30, 1981.

regulatory program, of supplier-purchaser relationships in effect on December 1, 1973, under contracts for sales, purchases and exchanges of domestic crude oil. This regulation stabilized the nation's crude oil distribution system and precluded vertically integrated refiners from shifting their own crude oil production to their own refineries and thereby severing the historic access of nonintegrated refiners to domestic crude oil supplies. The constitutionality of this regulation was upheld in *Condor Operating Co.* v. *Sawhill*, 514 F. 2d 351 (T.E.C.A.), certiorari denied, 421 U.S. 976.

To assure further that "small" and "independent" refiners (as those terms are defined in Section 3(3) and (4), 15 U.S.C. (Supp. IV) 752(3) and (4)) had adequate access to crude oil supplies during the period of shortage, F.E.A. also adopted a Mandatory Crude Oil Sales regulation (the "buy/sell program"). 10 C.F.R. 211.65. It entitles those refiners to purchase petroleum from the 15 largest domestic refiners in sufficient quantity to obtain volumes of crude oil not less than the volumes obtained in 1972. Since oil transferred under the buy/sell program was until recently sold at the vendor's weighted average price for all its crude oil, the purchasers obtained some advantage from the lower, controlled price of old oil to the extent that the sellers had greater access to it.

The December 1 Rule and the buy/sell program guaranteed small and independent refiners access to minimum crude oil supplies. However, these regulations had little effect upon the disparity in the costs

of raw materials the two-tier pricing system had created between refiners with access to price-controlled old oil and refiners dependent upon market-priced domestic or foreign oil for the bulk of their supply. During the May 1973 base period, the composite crude oil costs of all refiners were approximately equal. But as a result of the implementation of the two-tier system, the major integrated oil companies, which as a class had far greater access to "old" oil, had significantly lower composite crude oil costs than the small and independent refiners (Pet. App. 5a n. 6, 27a-28a). See *Pasco, Inc.* v. *Federal Energy Administration*, 525 F. 2d 1391, 1395 (T.E.C.A.).

The prices charged by refiners for finished products necessarily reflected the differential in raw materials prices.[5] With the availability of adequate supplies upon the lifting of the Arab oil embargo and the renewed significance of price competition, refiners which were disproportionately reliant upon crude oil sold at open market prices were at a competitive disadvantage and were forced to absorb a portion of their increased raw materials costs or suffer a reduction in their market share (Pet. App. 5a, 27a-28a). F.E.A. found that the refiners' unequal access to price-controlled oil had interfered with market mechanisms, weakened the competitive viability of the small and independent sectors of the petroleum in-

[5] Section 4(b)(2)(A) of the Allocation Act, 15 U.S.C. (Supp. IV) 753(b)(2)(A), required that F.E.A.'s petroleum price regulations provide for a dollar-for-dollar pass-through of net increases in crude oil costs to marketers or retailers.

dustry, and produced inter-regional price differentials for some refined petroleum products, in contravention of the congressional intention expressed in the Allocation Act (*ibid.*). 39 Fed. Reg. 39740; see *Pasco, Inc.* v. *Federal Energy Administration, supra*, 525 F. 2d at 1395.

In order to allocate equitably the benefits of price-controlled old oil (whose scarcity value the two-tier system artificially created) among all segments of the petroleum industry, all regions of the country, and all users of petroleum products, while retaining the inflation dampening and domestic production incentive aspects of the two-tier system, F.E.A. adopted the Cost Equalization Program, 10 C.F.R. 211.67, which petitioners challenge (Pet. App. 6a). Under this program, each refiner must possess one "entitlement" for each barrel of old oil which it refines during any month. F.E.A. initially issues each refiner the number of entitlements equal to its proportionate share of all the old oil refined in the United States during that month.[6]

A refiner which processes more than its proportionate share of the national old oil supply in any month must purchase additional entitlements from a refiner which processed less than its proportionate share of price-controlled oil. F.E.A. establishes the

[6] The entitlements program favors small refiners, by providing this class with additional entitlements in order to strengthen their economic viability. 10 C.F.R. 211.67(e). Petitioners do not specifically challenge this aspect of the oil entitlements program.

price of the entitlement on a monthly basis in an amount equal to the approximate difference between the weighted average prices charged for old oil and upper tier or higher-priced crude oil.[7] 10 C.F.R. 211.67(i)(4). Refiners who sell entitlements are required to reduce their raw materials costs by the amount of entitlement sales proceeds for cost pass-through purposes, and purchasers of entitlements are allowed to include the cost of entitlements in their crude oil costs. *Id.* at 211.67(*l*).

The combined effect of the entitlements program and the cost pass-through regulations is to eliminate the inequities created by the two-tier pricing system and substantially to equalize the average weighted crude oil costs of all refiners (Pet. App. 7a).[8] See *Pasco, Inc.* v. *Federal Energy Administration, supra,* 525 F. 2d at 1395.

3. Each month since the inception of the entitlements program, petitioners in No. 75-1230 have processed more than a proportionate share of the national old oil supply and have been required to purchase additional entitlements from other refiners (Pet. No. 75-1230, pp. 9-10; Pet. App. 30a).

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[7] The price of an entitlement was initially $5.00 in January 1975 and was $8.09 in January 1976.

[8] The Cost Equalization Program does not, and was not intended to, equalize fully all crude oil costs. For example, the historic disparities in crude oil costs caused by quality and transportation differentials are not affected by this program. The only disparity in crude oil costs equalized by the program is the price differential artificially created by the two-tier pricing system.

Petitioners instituted this action in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against operation of the Cost Equalization Program. The complaint alleged that the Cost Equalization Program exceeded F.E.A.'s authority under the Allocation Act and was unconstitutional as an administratively imposed tax and a taking of private property for a public purpose, without just compensation.

The district court consolidated the hearing on petitioners' motion for a preliminary injunction with the hearing on the merits and entered judgment for respondents. It held that the Cost Equalization Program was a valid exercise of F.E.A.'s allocation authority under Section 4(a) of the Allocation Act (Pet. App. 32a). Furthermore, it noted that both Houses of Congress had approved F.E.A.'s implementation of a Cost Equalization Program without amendment of Section 4(a) at the time they extended the Act (Pet. App. 33a). It concluded that the conjunction of the entitlements program's allocation of old oil and F.E.A.'s cost pass-through regulations constituted a rational attempt, in conformity with the congressional intention, to eliminate the inequities caused by the two-tier pricing system (Pet. App. 34a). It also held insubstantial petitioners' constitutional challenges (Pet. App. 35a-37a).

The Temporary Emergency Court of Appeals affirmed (Pet. App. 1a-23a). Considering F.E.A.'s authority under Section 4(a) to allocate crude oil and specify its price together with the objectives

sought to be achieved specified in Section 4(b), the court held the "Entitlements Program * * * clearly within the authority conferred on [F.E.A.] under the Allocation Act" (Pet. App. 9a-10a). The court also found that the entitlements program did not, even incidentally, raise any revenue for the government or its general support and therefore concluded that it did not constitute a tax within the meaning of Article I, Section 8, Clause 1 of the Constitution (Pet. App. 22a). Finally, it held that the Cost Equalization Program was not an appropriation of petitioners' property by the government but was a legitimate exercise of the government's admitted power to regulate the allocation of oil, and that the fact that the effect of the program was to limit petitioners' ability to realize the greatest possible profit on the disposition of that property did not make it a taking of their property in violation of the Fifth Amendment (Pet. App. 15a, 19a-20a).

4. Petitioner in No. 75-1259 instituted this action in the United States District Court for the Northern District of Ohio seeking injunctive relief against operation of the Cost Equalization Program, and specifically from having to purchase $11.6 million in entitlements. The complaint alleged that the entitlements program exceeded F.E.A.'s authority under the Allocation Act and that it violated the Fifth Amendment by effecting a taking of petitioner's property for a private, rather than a public purpose, and without just compensation.

The district court consolidated the hearing on petitioner's motion for a preliminary injunction with the trial on the merits and dismissed the complaint (Pet. No. 75-1259 App. 3a-5a). The court also refused to certify the constitutional question for appeal.[9]

The Temporary Emergency Court of Appeals affirmed, on the ground that its prior decisions in *Pasco, Inc.* v. *Federal Energy Administration*, *supra*, and *Cities Service* were "dispositive as against all of the contentions of [petitioner]" (Pet. No. 75-1259 App. 1a).

ARGUMENT

In essence, petitioners contend that the Cost Equalization Program does not effectuate an "allocation" of crude oil, as that term is used in Section 4(a) of the Allocation Act, but constitutes a direct subsidy of less competitive refiners (Pet. No. 75-1230, pp. 10-12; Pet. No. 75-1259, p. 9). They argue that the program exceeds F.E.A.'s authority under the Allocation Act and is, in any event, unconstitutional. These arguments have been carefully considered and rejected in a series of cases by the Temporary Emer-

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[9] The district court previously had denied similar motions by petitioner for a preliminary injunction against operation of the entitlements program and for certification of the constitutional question (Pet. No. 75-1259 App. 27a-45a). The Temporary Emergency Court of Appeals dismissed petitioner's appeal from that order for lack of jurisdiction. *Marathon Oil Co.* v. *Federal Energy Administration*, 516 F. 2d 1397.

gency Court of Appeals, which has exclusive jurisdiction to consider challenges to the validity and constitutionality of regulations issued under the Allocation Act. Section 5(a)(1), 15 U.S.C. (Supp. IV) 754 (a)(1), which incorporates by reference Sections 211(b)(2) and (c) of the Economic Stabilization Act of 1970, 85 Stat. 749, as amended, 12 U.S.C. (Supp. IV) 1904 note.

In the exercise of its special familiarity with the provisions and legislative history of the Act, that court has concluded that the entitlements program is an allocation mechanism "clearly within" F.E.A.'s statutory authority (Pet. App. 9a-10a) and therefore has rejected the correlative constitutional arguments. There is no conflict of decisions among the courts of appeals on these questions, and the decisions of the Temporary Emergency Court of Appeals do not conflict with any decisions of this Court. Further review is not warranted.

1. Petitioners contend (Pet. No. 75-1230, p. 17; Pet. No. 75-1259, pp. 14-15) that F.E.A. lacked authority under the Allocation Act to promulgate the Cost Equalization Program. They claim that the entitlements program does not allocate crude oil among refiners or regulate its price, as the statute authorizes, but requires refiners to pay cash subsidies to less efficient competitors.

However, payments under the Cost Equalization Program are in no sense a subsidy—no refiner is required to transfer to another person property to which it is otherwise lawfully entitled. Rather, to further other objectives of the Allocation Act, the

government by regulation fixed the sales price of one component of crude oil production, designated "old" oil, substantially below the open market level. Refiners which fortuitously had access to that petroleum would have received a windfall profit, in the absence of a countervailing government regulation. The price-control regulation granted those refiners no cognizable property right that entitled them to enjoy that price differential. The Cost Equalization Program simply regulates, on an equitable basis, the access of domestic refiners to that crude oil whose price the government has set below its market value (Pet. App. 5a-6a, 22a).

The broad grant of power to the President under the Allocation Act authorized F.E.A. to allocate this government-created benefit through the entitlements program. Section 4(a) requires that the President provide for "the mandatory allocation of crude oil * * * in amounts * * * and at prices specified in" appropriate regulations. The Conference Committee Report on the Allocation Act stated: "The President is intended to have full flexibility in devising the most effective and efficient means of meeting the priority needs of the American people * * *." H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 12 (1973). Thus, Section 4(a) would permit F.E.A. to ameliorate the disparities created by the two-tier pricing system through the physical allocation of old oil and

new oil among domestic refiners at regulated prices.[10] Congress pointed out that "[i]t is specifically intended that the allocation program operate at the refinery level to compel inter-refinery transfers and exchanges of crude oil." H.R. Conf. Rep. No. 93-628, *supra*, at 22.

Ordering the physical transfer of oil, however, would have disrupted existing market mechanisms, and imposed enormous administrative burdens on both the refiners and the government, while the additional transportation costs would have greatly increased the price of crude oil. 39 Fed. Reg. 31650. Moreover, there is no physical justification for such transfers, since "old" oil and "new" oil are chemically fungible; their sole distinguishing characteristic is the lower price of the former resulting from price controls.

F.E.A. therefore created a paper unit of account, the "entitlement," and required that it be transferred instead of the oil it represents. Each entitlement corresponds to one barrel of old oil. Its sale effectuates the same result as the physical exchange of one barrel of old oil, plus the equalization fee, for a barrel of new oil, but without incurring additional distribution costs. Thus, the entitlements program

[10] Contrary to the assertion of petitioners in No. 75-1230 (Pet. 19-20), under a system of actual transfer of lower priced oil to some refiners, if they had refined and sold excess quantities of price-controlled oil in any month, they would be obligated to purchase sufficient quantities of uncontrolled oil to rectify the discrepancy.

cheaply and efficiently produces an allocation of crude oil at regulated prices. The Temporary Emergency Court of Appeals correctly held that F.E.A. had authority under the Allocation Act to adopt it. See *Pasco, Inc.* v. *Federal Energy Administration*, *supra*, 525 F. 2d at 1402.

Moreover, in extending the Allocation Act beyond its original expiration date, both Houses of Congress noted that they had refrained from explicitly requiring that F.E.A. adopt a Cost Equalization Program only because F.E.A. had announced that it intended to promulgate such a system under its existing authority. The Senate Committee Report stated (S. Rep. No. 93-1082, 93d Cong., 2d Sess. 2 (1974)):

> [The Allocation Act] provides ample authority for the FEA to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that the FEA intends to institute a price equalization program under existing authority in the immediate future.

Similarly the House Report recognized F.E.A.'s authority to institute a cost equalization plan (H.R. Rep. No. 93-1443, 93d Cong., 2d Sess. 3 (1974)):

> Moreover, the Act includes adequate authority to permit the FEA to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the

> regional and competitive inequities which result from a dependence upon high-cost imported oils and petroleum products. The FEA's stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee that specific amendments to the Act to compel such action may prove to be unnecessary.

See *Id.* at 7 (Statement of John C. Sawhill, Administrator, Federal Energy Administration). As the court below observed (Pet. App. 10a-11a n. 10), these statements of congressional intent, contemporaneous with the first extension of the Act in 1974, confirm that the Allocation Act has, from the date of its enactment, authorized the entitlements program.[11]

Finally, the enactment of Section 403(a) of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 948, shows that Congress recognized that F.E.A. had authority to adopt an entitlements plan. In requiring that any regulation promulgated under Section 4(a) "which requires the purchase of entitlements" contain specific provisions to

[11] Congress has been fully informed of the operation of the entitlements program, see Hearings on Energy Conservation and Oil Policy before the House Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, Ser. No. 94-17, 94th Cong., 1st Sess. 459 (1975); Hearings on Oversight-Federal Energy Administration Programs before the Senate Committee on Interior and Insular Affairs, Ser. No. 94-16, 94th Cong., 1st Sess. 525 (1975), and extended the Act on three occasions without modification of the relevant language of Section 4(a). Pub. L. 93-511, 88 Stat. 1608; Pub. L. 94-99, 89 Stat. 481; Pub. L. 94-133, 89 Stat. 694.

protect the small entitlements purchaser, Congress explicitly acknowledged the existence of an equalization program as a constituent of the national energy regulation plan.[12] See Section 455 of the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 952.

2. Petitioners contend (Pet. No. 75-1230, p. 15; Pet. No. 75-1259, p. 8) that the mandatory purchase of entitlements constitutes the taking of private property for public use without just compensation, in violation of the Fifth Amendment.[13]

As discussed at pp. 14-15, *supra*, however, these payments constitute the mechanism for equitable dis-

[12] Petitioner in No. 75-1259 erroneously suggests (Pet. 14-15) that the decision below conflicts with *Algonquin SNG, Inc.* v. *Federal Energy Administration*, 518 F. 2d 1051 (C.A.D.C.), certiorari granted, 423 U.S. 923, argued April 20, 1976 (No. 75-382). The question in that case is whether the President is authorized to adjust imports of oil by imposition of a system of license fees under Section 232(b) of the Trade Expansion Act of 1962, 76 Stat. 877, as amended, 19 U.S.C. (Supp. IV) 1862(b). The authority of the President to impose such fees under that different statute is irrelevant to any issue in these cases.

Petitioner's reliance (Pet. 15) on *Shell Oil Co.* v. *Federal Energy Administration*, 527 F.2d 1243 (T.E.C.A.), is similarly misplaced. The court there held that F.E.A.'s, authority to regulate the price of petroleum products did not empower it to continue regulation of gas station rentals upon the expiration of wage-price controls.

[13] As the district court noted in *Cities Service* (Pet. App. 36a-37a), all of the district courts that have considered a similar Fifth Amendment challenge to the Cost Equalization Program have considered it insubstantial and have refused to certify it for appeal to the Temporary Emergency Court of Appeals.

tribution of the benefits conferred by government imposition of price controls on old oil; they do not represent a subsidy of the sellers of entitlements. Moreover, the property interest petitioners assert is no more than an unilateral expectation that the government would not withdraw the benefit it previously had extended to those with access to old oil by later amending its petroleum allocation regulations to eliminate their anticipated windfall. This mere expectancy is not a compensable interest under the Fifth Amendment. See *Louisville Bridge Co.* v. *United States*, 242 U.S. 409.[14]

In any event, as the court below properly pointed out (Pet. App. 15a), consequential injuries resulting from the exercise of lawful administrative authority are not compensable under the Fifth Amendment. See *Knox* v. *Lee*, 12 Wall. 457, 551. The constitutionality of petroleum allocation regulations that have the incidental effect of limiting the price at which a refiner may dispose of its crude oil was established in *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351 (T.E.C.A.), certiorari denied, 421 U.S. 976. Here, as part of its overall emergency program to alleviate the inflationary increase in petroleum prices and limit dependency on foreign oil production, the government has instituted allocation and price controls

[14] Since the entitlements program gives rise to no compensable taking within the meaning of the Fifth Amendment, the argument of petitioner in No. 75-1259 (Pet. 13-14) that the mandatory purchase of entitlements constitutes a taking for a private, rather than a public, purpose is irrelevant.

that have the derivative effect of limiting the profitability of petitioners' sales of old oil.[15] The court below correctly held (Pet. App. 20a):

> The fact that [petitioners in No. 75-1230] cannot now capitalize upon these events and refine its own much lower priced oil at will and thereby gain a larger market share or even higher profit margins does not render the program unconstitutional.

See also, *Block* v. *Hirsch*, 256 U.S. 135.[16]

As the Temporary Emergency Court of Appeals observed (Pet. App. 21a n. 20), this Court has held that a comparable milk price equalization pooling program, instituted under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 601, did not deprive persons required to make payments into the equalization fund of their property in violation of the Fifth Amendment. *United States*

[15] Contrary to the assertion of petitioner in No. 75-1259 (Pet. 11), the fact that Congress recently has extended the effectiveness of petroleum allocation regulations for forty months in no way detracts from the emergency nature of the problems which those regulations address, although they may differ to some extent from the problems in existence at the time the Allocation Act first was enacted. S. Conf. Rep. No. 94-516, *supra*, at 204.

[16] Petitioners also contend (Pet. No. 75-1230, p. 17; Pet. No. 75-1259, p. 13) that the entitlements program constitutes a taking without compensation to the extent that their entitlement purchase costs are not passed through to their customers. However, as the Temporary Emergency Court of Appeals noted (Pet. App. 11a-12a), petitioners' election not to take full advantage of the pass-through regulation in order to have a competitive advantage reflects their business judgment rather than governmental compulsion.

v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 571-573. That program required handlers which sold milk for the most profitable end uses to pay money through a pooling arrangement to handlers which sold milk for less profitable uses. Under the regulation, all milk producers ultimately received a uniform price for all milk sold to handlers. That price equalization regulation, as amended, subsequently has been held applicable to sales of both milk handlers purchase from others and milk they produce themselves. *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608 (C.A. 3), certiorari denied, 372 U.S. 965; see *Freeman* v. *Vance*, 319 F. 2d 841 (C.A. 5). Those decisions strongly support the constitutionality of the instant Cost Equalization Program.

3. Petitioners in No. 75-1230 contend (Pet. 11) that the Cost Equalization payments constitute a tax imposed by an administrative agency, in violation of Article I, Section 8, Clause 1 of the Constitution. Their argument rests on the assumption that entitlement payments are direct subsidies of other refiners for a public purpose, and is fully answered at pp. 14-15, *supra*.

Furthermore, as the court below properly held (Pet. App. 22a), a regulatory requirement does not constitute a tax within the meaning of the Constitution unless its real purpose and effect is to raise revenues for the general support of the government. See the *Head Money Cases*, 112 U.S. 580, 595; *United States* v. *Butler*, 297 U.S. 1, 61; *Moon* v. *Freeman*, 379 F. 2d 382, 391 (C.A. 9); *Rodgers* v. *United*

States, 138 F. 2d 992, 994 (C.A. 6). Since the Cost Equalization Program produces no revenue for the government, payments for entitlements are not a tax (Pet. App. 22a-23a).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

STANLEY D. ROSE,
Attorney.

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